Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 456.

WILLIAM F. FLUHRER, et al.,

Appellants,

vs.

NEW YORK LIFE INSURANCE COMPANY.

BRIEF OF APPELLANTS.

HOWARD H. WILLIAMS,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 456.

WILLIAM F. FLUHRER, and others,
Complainants-Appellants,

against

NEW YORK LIFE INSURANCE COMPANY,
Defendant-Appellee.

BRIEF FOR APPELLANTS.

APPEAL FROM CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK:

This case comes before the Court upon an appeal taken from the decree of the United States Circuit Court for the Southern District of New York sustaining a demurrer to the bill, filed by the complainants who hold policies issued by the defendant, on behalf of themselves and all other

policy holders similarly situated, for the purpose of restraining the defendant from making a return of its income and paying a tax thereon pursuant to the provisions of Section 38 of the Act of August 5, 1909, which Section is known as the "Corporation Tax Law."

The bill sets forth certain facts, as follows:

The defendant is a corporation without any capital stock, organized under a Special Act of the Legislature of the State of New York in 1841, and is vested with certain corporate powers as a mutual life insurance company, operating solely under the supervision and control prescribed by the Insurance Law of said State.

All of defendant's assets and all its income are acquired, invested, reserved and held for the sole benefit and protection of the holders of policy and annuity contracts issued by it, and such assets and income are paid and distributed to its policy holders as in such Insurance Law prescribed. Defendant has outstanding approximately 981,590 policies, of an approximate face value of $2,002,809,227, and this suit is for an object common to them all. At the close of business on December 31, 1909, the assets of the defendant exceeded the sum of $599,000,000. Among such assets were included bonds of the United States Government, various States, and Municipalities of the aggregate market value of $77,015,254, of which United States Government bonds are of the value of $1,150,000, bonds of the State of Massachusetts $4,200,000, and bonds of the City of New York $7,000,000. All of the bonds so held were issued pursuant to lawful provisions exempting them from taxation for all purposes.

Furthermore, defendant owned at that date various parcels of real estate of the aggregate value of $11,718,000, from which it received an annual income in excess of $526,000 over and above all taxes, repairs and expenses of maintenance. Of this real estate various parcels having an aggregate value of over $2,400,000 are located in foreign countries, namely, France, Prussia, Austria, Holland and Servia. Defendant is engaged in the business of writing insurance all over the civilized world and approximately one-quarter of its business is derived from foreign countries in no way under the jurisdiction of the United States.

Under the law of New York, there is no distinction in substance between the methods of holding and preserving the assets of the defendant for the benefit of its policy holders and the methods employed by saving banks and benefit associations, in holding their assets for depositors and members respectively, in that all assets are held by such institutions for the sole benefit of the policy holders, depositors and members, and the corporations themselves make no profits from the ownership of such assets, by reason of the law which prescribes that all surplus earnings must be apportioned yearly for the benefit of the policy holders, depositors and members and are the property of the same when so apportioned.

Many domestic and foreign corporations do business in the United States on lines similar to those pursued by the defendant, the amount of the business varying in each case, so that the exemption provided in the Statute above mentioned forms a widely different proportion to the net income of such corporations.

Defendant purposes to make and file with the Collector of Internal Revenue in the City of New York a return in the form prescribed by the Commissioner of Internal Revenue in compliance with the requirements of the said Act, and defendant intends to include in the income upon which such computation is made the income derived from said bonds of the United States, the State of Massachusetts and the City of New York, and defendant claims that by virtue of the alleged authority and requirements of such Act it is required to pay, and it intends to pay, to said Collector on or before June 30, 1910, a tax of One Per Cent. (1%) on its net income for the year 1909, computed as aforesaid.

The net income of defendant for the year 1909 is in excess of $10,000,000, computing the same as in such Act prescribed.

The bill then charges that the provisions of said Act for a corporation tax are unconstitutional, null and void, in that the said tax is a direct tax in respect of the real estate held and owned by defendant in its own right, which tax is not in and by said Act apportioned among the several States, as required by Section 2 of Article I, of the Constitution; and also that if the tax is not held to be a direct tax its provisions are nevertheless unconstitutional, because they are not uniform throughout the United States as required by Section 8 of Article I of the Constitution.

The bill charges further that the tax is not uniform as to property, class, or subject because the net income above actual operating and business expenses of many labor, agricultural and horticultural organizations, fraternal, beneficiary societies, orders and associations, and domestic

building and loan associations, amounts to more than $5,000 per annum, and said Act creates an artificial distinction between such corporations and the defendant, and that said Tax is imposed upon defendant and other mutual insurance companies but is not imposed upon the other corporations so named, nor upon mutual savings banks, although in Massachusetts by a Statute enacted in the year 1907 mutual savings banks are authorized to issue life insurance policies upon terms and under conditions substantially similar to those controlling the business of the defendant by the law of New York.

The complainants further charge the tax to be unconstitutional because it is imposed upon a small minority of the corporations of the United States, namely those which have profits in excess of $5,000 per annum, and that the remaining corporations comprising the great majority of those in the United States are exempted from payment of the tax, although they hold in the aggregate the greater part of all corporate property.

Again, it is claimed that the provisions of the corporation tax are unconstitutional, because the tax is imposed upon income not taxable under the Constitution of the United States, being derived from bonds of the United States, of the several States, Counties and Municipalities thereof.

Again it is claimed that the tax is unconstitutional, because all the corporations thereby taxed may, under and by virtue of its provisions, be deprived of their property without due process of law, in violation of Article V of the Amendments of the Constitution.

The complainants then allege the tax is also unconstitutional because all corporations thereby

taxed may be compelled to produce and disclose their private books and papers in order to make them liable for the penalty or forfeit their property, in violation of Articles IV and V of the Amendments to the Constitution.

Finally, it is stated that the suit is not collusive; that if the defendant pay such tax it will diminish its assets, decrease the amounts which the policy holders are entitled to receive and lessen the value of all such policies; with the result that such tax is a direct tax upon the policy holders.

The bill concludes with the statement that this is a suit of a civil nature in equity, and that the matter in dispute exceeds, exclusive of interest and costs, the sum of $5,000, and that it arises under the Constitution and Internal Revenue Laws of the United States, and complainants pray that it may be adjudged and decreed that the provisions of Section 38 of the Act are unconstitutional, and that the defendant be restrained from voluntarily complying with the provisions thereof.

The defendant demurred on the ground of want equity and the bill was dismissed with costs, whereupon the record recited that the constitutionality of a law of the United States was drawn in question and an appeal was allowed directly to this Court.

Assignment of Errors.

Complainants assign as error that the Court erred in not holding the Act mentioned unconstitutional in that it violates Section 2 and 8 of Article I of the Constitution, and Articles IV and V of the Amendments thereof.

I.

The tax imposed by the Act of 1909 considered as an income tax is void.

1. The law of 1909 differs from the law of 1894 only as follows:

(a) By exempting all individuals.

(b) By imposing a tax on domestic mutual insurance corporations and upon the business in the United States of like foreign corporations.

(c) By including the income derived from government bonds, otherwise exempt.

(d) By increasing the amount of net income exempted from $4,000 to $5,000.

(e) By reducing the rate of tax from 2% to 1%.

2. The tax of 1909, as was the tax of 1894, is an attempt to levy a tax upon income derived from real estate and personal property, including State and Municipal bonds otherwise exempt, and is imposed without apportionment.

It is respectfully submitted that what this Court held in the Pollock case to be invalid under the Act of 1894, applies to that which is identical in principle under the Act of 1909, and the invalidity thereof is thereby established.

It is an established rule of constitutional construction that "the *judiciary will not regard mere "forms, but will look through the forms to the sub-"stance of things.*" Such is the language of Mr. Justice Harlan in the recent decision of Western Union Tel. Co. vs. Kansas, 216 U. S., 1, at page 27.

Citing

Henderson vs. Kansas, 92 U. S., 259, 268.
Mugler vs. Kansas, 123 U. S., 623, 661.
Lyng vs. Michigan, 135 U. S., 161, 166.
Robbins vs. Shelby Tax Dist., 120 U. S., 489, 497.
Minnesota vs. Barber, 136 U. S., 313, 319, 326.

To exactly the same effect is the statement of Mr. Justice Moody in Home Savings Bank vs. Des Moines, 205 U. S., where, at page 510, he says: "*But the true interpretation of the law cannot "rest upon a single phrase* in it. *All its parts "must be considered* in the manner pursued by this "Court in New Orleans vs. Houston, 119 U. S., 265, 278, and Home Ins. Co. vs. New York, 134 U. S., 594, *with a view of determining the end accomplished* by the taxation, *and its actual and substantial purpose and effect.*"

Under this principle therefore it is clear that the phraseology of the law "*a special excise tax with "respect to the carrying on or doing business,*" etc., will not avail if the actual end and effect of the law is the taxation of corporate income in violation of constitutional limitation.

It is appropriate to cite here the *Bank Tax Case,* 2 Wall, 200, holding that a State might not tax indirectly, in the "*measured by*" *method,* what it could not tax directly.

So in *Home Bank* vs. *Des Moines,* 205 U. S., 515, the Court in reaffirming the doctrine of Federal immunity from State taxation, declined to find a distinction between a tax on Federal securities and the capital invested in such securities.

Citing Bank Tax Cases and

Weston vs. Charleston.
O. N. Bk. vs. Owensboro, 173 U. S., 664.

If a tax on gross receipts, *not even disguised as an occupation tax,* is not helped out by its being *measured* by or *equal* to a definite percentage, the same rule would seem to govern a tax with such a disguise. For the disguise is but a thin and transparent device disclosing the old, unlawful unapportioned income tax. And there is not even a "slight concealment."

Home Bk. vs. Des Moines, 205 U. S., 515.

If the Government needs an income tax why not have one in the constitutional way? Because it would be unpopular is the only adequate answer.

It seems to need no further argument that the present corporation tax is a direct tax upon the real personal property held by the defendant for its policy holders, and also upon the Government, State and Municipal bonds owned by it. The tax is therefore invalid, not being apportioned according to population.

The "actual effect" is clearly manifested in the case of the present defendant. Its net income from investments is approximately $26,000,000 of which $526,000 is from real estate, about $3,000,000 from Government, State and Municipal bonds.

This case therefore falls directly under the authority of *Income Tax Cases*, 157 U. S., 429; 158 U. S., 601.

It is an attempt

1. To tax the income of State and Municipal securities.

2. Under the phraseology of an excise tax, to levy in purpose and effect, a direct tax, without apportionment, upon the rentals of real estate and the income derived by the defendant corporation generally from its investments in personal property.

Neither of which acts is within the power of Congress and the law is therefore unconstitutional and void.

Inasmuch as, by an order of the Court, this appeal is to be argued with a number of other cases involving the validity of the Act of 1909, no further citation of authorities will be made under this Point and the continuation of this brief will be directed to the application of the Act to the special facts shown in the bill.

II.

The tax imposed upon defendant, as by the Act of 1909 required, is a direct tax, and therefore void.

The defendant is a corporation created by the State of New York, without capital stock or shares, and exercises its corporate powers as a strictly mutual life insurance company, as in the Insurance Law of such State prescribed. In addition to the payment of its policies as they mature, defendant is bound to apportion yearly to its policy holders any surplus earned in excess of specific amounts lawfully reserved. No gains or profits can be derived by defendant from such exercise of its powers.

The statutory conditions upon which the powers of defendant are exercised are set forth in Chapter 28 of the Consolidated Laws of the State of New York, therein designated the Insurance Law, an extract from which is as follows:

> "Section 83. Upon the thirty-first day of "December of each year, or as soon there- "after as may be practicable, every such cor- "poration shall well and truly ascertain the "surplus earned by such corporation during "said year. After setting aside from such sur- "plus such sums as may be required for the "payment of authorized dividends upon the "capital stock, if any, and such sums as may "properly be held for account of existing defer- "red dividend policies and for a contingency "reserve not in excess of the amount prescrib- "ed in this article, *every such corporation shall "apportion the remaining surplus equitably "to all other policies entitled to share therein.* "Except in the case of a term or an industrial "policy *the share of surplus so apportioned* in "the case of a policy issued on or after the "first day of January, nineteen hundred and "seven, *shall, at the option of the owner of "the policy, be payable in cash, or shall be "applicable to the payment of any premium "or premiums upon said policy or to the "purchase of a paid-up addition thereto or "shall be permitted to accumulate to the "credit of the policy at such rate of interest "as shall be allowed by the company, and "with such interest shall be payable upon "the maturity of the policy or shall be with- "drawable in cash by the owner of the policy*

"*on any anniversary of the date of issue* "*thereof.* Such corporation may require "the owner of the policy to elect the manner "in which said dividends shall be applied as "above provided by mailing a written notice "of the amount of said dividends and the "options available as aforesaid in a sealed "envelope in the manner required by the "provisions of this chapter for notices of "premium payments, and in case the owner "shall fail to notify the company in writing "of his election within three months after "the date of mailing of said notice, the "surplus shall be applied by the company "to the purchase of a paid-up addition to the "sum insured."

Corporations of this character were expressly exempted from income tax by the Act of 1894. The present Act, however, purports to tax mutual insurance companies, although still exempting from its provisions mutual savings banks, fraternal orders and benefit associations. This is a marked departure from the policy of earlier Acts to which Congress was doubtless led by the fact that the net earnings of mutual insurance companies are estimated to be not less than $100,000,000 a year. There is, however, a sharp distinction between such corporations and business corporations organized for gain, and the effect of this distinction must be noted. In one case all corporate property is held by the corporation for its own account, and its shareholders—although the ultimate beneficiaries —have no direct interest therein; while in a mutual life insurance company the legal relation of the policy holders to the corporation is quite dif-

ferent. It is well understood, and is the feature of mutual life insurance which gives to it great stability, that policy holders pay premiums in excess of the actual cost of their insurance and it is the surplus arising each year over actual cost and reserves which must be returned to the policy holders by the statutory apportionment.

It follows, then, from the application of such Insurance Law to the tranactions of defendant that it is an instrumentality used by its policy holders for the sole purpose of combining and employing their savings for the mutual protection of themselves and their dependents at the lowest possible cost and with the largest possible returns of yearly surplus, having dye regard to safety, and without profit to the corporation or to the policy holders.

Such being the status of defendant it is respectfully submitted that the tax imposed upon it by the Act of 1909 is a tax measured by a surplus fixed and set apart by the law of New York for payment to the policy holders of defendant, and is therefore a direct tax upon property held by defendant for such payment. Under the *Pollock* case it is also a direct tax upon so much of such surplus as is derived from the income of real estate and the income of personal property, including Government, State and Municipal bonds, otherwise exempt.

Pollock vs. *Farmers' Loan & Trust Co.*,
157 U. S., 429; 158 U. S., 601.

III.

As an Excise on business or occupation the tax imposed on defendant by the Act of 1909 is void, for reasons as follows:

1. It is not uniform.

2. It is not equal upon the classes assessed.

3. It takes property without due process of law.

4. It creates a favored class.

1. *The tax is not uniform.*

It is unquestionably within the power of Congress to levy an excise under Sec. 8 of Article I, upon the business of life insurance in which this defendant is engaged.

And such a law might well include an almost limitless variety of occupations or businesses. Any and all such excises must, however, comply with two fundamental principles.

(a) They must be uniform throughout the United States.

(b) They must contain that element of equality or uniformity which is at the base of all taxation, of bearing with equal weight upon all persons of equal resources engaged in the same line of business.

Any other course means that Congress can drive whomsoever it sees fit out of any line of activity taxable under Section 8.

And the definition and meaning of the word "excise" as it was used at the time of the adoption of the Constitution would thereby be destroyed; for all are agreed that such a tax was considered a tax on consumption, one which could be shifted from the original manufacturer to the purchaser. Very obviously, if Congress has the constitutional power to tax industries when carried on by corporations —at the same time exempting all individuals and firms, as here—the corporations cannot shift the burden for those exempted from the tax can undersell. If Congress has the power to tax at all, in this manner it can tax at such rate as it sees fit until any or all corporations in any given line of industry are driven out of existence.

As Judge Cooley said in his work on Constitutional Limitations—page 695:

> "Everything that may be done under the "name of taxation is not necessarily a tax; "and it may happen that an oppressive bur- "den imposed by the government, when it "comes to be carefully scrutinized, will "prove, instead of a tax, to be an unlawful "confiscation of property, unwarranted by "any principle of constitutional govern- "ment."

It is clearly established that if Congress wishes to impose an excise on sugar refining or distilling, or life insurance, it must impose such tax, without discrimination, upon all those, whether persons, firms or corporations, who in like manner and under similar conditions engage in the particular line of business made subject to the tax.

And for the same reasons, it cannot impose an excise upon the business or occupation of all cor-

porations engaged in a certain line of business, or as in this law in all lines of business, and exempt all persons, firms or mutual associations engaged, with similar capital in like lines of business.

Such excise is not taxation but confiscation and is not within the constitutional powers of Congress.

In *Pollock vs. Farmers' Loan & Trust Co.*, 157 U. S., 429, this fundamental principle was recognized by all the distinguished counsel. The Attorney-General and his assistant saw fit to use illustrations most pertinent to the present issues.

Mr. Whitney, at page 474, says "there is, however, a certain degree of uniformity involved in the very word 'tax,' a uniformity requirement involved in the definition of that word and guaranteed by the Fifth Amendment to the Constitution." * * * *"A special tax cannot be laid upon A, simply because he is A and not B.* Such a law would be an attempt to exercise not a taxing power, but the power of eminent domain, and would require compensation for the property taken."

And the Attorney-General, at page 507, reinforces this point by the assertion that "A law, for instance, providing for a tax to be paid by the light complexioned members of the community and exempting the dark, *would be unhesitatingly pronounced void as being not a use but an abuse of the taxing power.*"

Manifestly it was the intention of Congress in enacting the present law to avoid the Income Tax decision under the Act of 1894 by denominating the present tax an "excise" for which purpose it undoubtedly relied upon the case of *Spreckles S. R. Co., vs. McClain*, 192 U. S., 397. But that case is wholly insufficient to sustain the present law.

In that case the Court evidently considered an excise tax to be a tax upon the business or occupation of the corporation assessed, and the law was valid only to the extent that the corporation so assessed was engaged in that business. The Act of 1898 applied to "every person, firm, corporation or company carrying on" the business mentioned. As an excise tax it therefore complied with the requirements of the Constitution that it should be uniform throughout the United States.

The present tax is limited to corporations and is therefore wholly wanting in the essential feature of uniformity.

It is imposed by the terms of the Act on every corporation, joint stock company or association organized for profit and having a capital stock represented by shares, and every insurance company engaged in business in the United States.

> "Provided, however that nothing in this "section contained shall apply to labor, agri- "cultural or horticultural organizations, or "fraternal beneficiary societies, orders, or as- "sociations operating under lodge system, and "providing for the payment of life, sick, acci- "dent, and other benefits to the members of "such societies, orders or associations, and de- "pendents of such members, nor to domestic "building and loan associations, organized and "operated exclusively for the mutual benefit of "their members, nor to any corporation or as- "sociation organized and operated exclusively "for religious, charitable or educational pur- "poses, no part of the net income of which in- "sures to the benefit of any private stockholder "or individual."

That the tax so levied is not a uniform excise duty, would seem perfectly apparent from the phraseology of the Act itself.

It must be conceded at the outset that the tax is not an excise upon any specific occupation or profession for none is specified, and if the tax were imposed upon certain trades or occupations, to be uniform it must be levied upon persons and firms as well as upon corporations and companies.

In *Knowlton* vs. *Moore*, 178 U. S., 41, it is held that the word "uniform" must be interpreted in the geographical sense. But the act of 1909 does not even comply with the requirements of uniformity as so defined.

The Statute arbitrarily exempts fraternal orders, benefit associations, building societies, and mutual savings banks—the last named because they are not included within the definition of corporations upon which the tax is imposed.

Thus the tax is not uniform in even a single State where these various organizations transact business. Further, the tax is not uniform throughout the United States because, as the bill shows, in the State of Massachusettes mutual savings banks are authorized to write life insurance policies by Chapter 561 of the Acts of 1907. This life insurance department in savings banks is, by the provisions of such law, conducted under conditions almost identical with those governing the business of this defendant as stated above. The particular Sections of the Act establishing this fact are as follows:

Massachusetts Acts of 1907, Chapter 561, entitled "An Act to Permit Savings Banks to Estab-"lish Life Insurance Departments.

"Sec. 2. Any savings bank may, upon com-
"plying with the provisions hereinafter set
"forth, establish an insurance department."

After providing for guaranty, reserve, and special emergency funds the Act reads:

"Sec. 21 * * * The balance of the net
"profits shall be distributed equitably annually
"among the holders of its policies and an-
"nuity contracts; such distribution to be made
"in the discretion of the trustees either
"in cash or by addition to the amounts pay-
"able under the policies or annuity contracts."

This affords a striking example of the non-uniformity of this Act throughout the United States due to this provision of Massachsetts law. It is a violation of the rules of uniformity and absolutely inequitable to tax this defendant in the State of New York and exempt corporations doing precisely the same business, on the very same conditions, in the adjoining State of Massachusetts.

In the same way building and loan associations, and fraternal beneficiary societies are all operated for the benefit of their members, as is the defendant here. It is common knowledge that fraternal societies have been obliged to abandon the old assessment plan upon which they were originally organized, and now accumulate a reserve for the payment of benefits exactly as the defendant company accumulates a reserve for the payment of death losses.

Such associations when organized in New York conduct their business under the Insurance Law.

Alden vs. K. of M., 178 N. Y., 535, 539-40.
Peo. vs. K. of St. J., 198 N. Y., 15.

The condition described is, however, not peculiar to New York societies, for in a very recent work on the subject, Bacon on Benefit Societies, 3rd Ed., §52, it is stated:

> "It follows from the foregoing adjudica-
> "tions that all benefit societies, whether cor-
> "porations or mere voluntary associations, are
> "strictly speaking, insurance organizations
> "whenever, in consideration of periodical con-
> "tributions, they engage to pay a member, or
> "his designated beneficiary, a benefit upon the
> "happening of a specified contingency."

Citing:

> Com. vs. Wetherbee, 105 Mass., 149;
> Franklin Ass'n vs. Com., 10 Pa. St., 357;
> Golden Rule vs. Swigert, 118 Ill., 492;
> End. Ass'n vs. State, 35 Kan., 253;
> Rockold vs. Society, 129 Ill., 440.

The subject of uniformity as affecting attempted exemptions of the character above described is most fully discussed in the opinion of Mr. Justice Field in the *Pollock* case at page 593, where it is explained that equality is an essential element of the uniformity required so far as the same is practicable, citing *U. S.* vs. *Singer*, 15 Wall. 111, 121, where it is held that the excise tax upon distillers was valid because uniform in its operation. "That "is, it is assessed equally upon all manufacturers "of spirits wherever they are. The law does not es- "tablish one rule for one distiller and a different "rule for another, but the same rule for all alike."

To the same effect were the *Head Money* cases, 112 U S., 580, 594, decided at circuit, 18 Fed.,

135, 139. A quotation is also made from the well-known lectures of Mr. Justice Miller on the Constitution (New York, 1891), where it is said, page 214: "*Different articles may be taxed at differ-*"*ent amounts provided the rate is uniform on the* "*same class everywhere, with all people, at all* "*times.*"

Applying these fundamental principles to the Act of 1909 it is plain that it does not meet these requirements. It does not extend to all corporations throughout the United States of the same class. A corporation writing life insurance in New York on certain conditions is assessed; a corporation writing life insurance in Massachusetts on conditions almost identical is exempted. Again, a corporation writing life insurance in New York is assessed if organized in a certain way and called a company, but a corporation writing life insurance in the same State, organized in a slightly different way but under the same general law and called the "Supreme Tent of the Knights of the Maccabees of the World" is exempted.

While not practicable in the case of the present defendant on account of its enormous interests extending all over the world, it would be possible with a smaller and more recently organized company, of exactly the same character, to defeat the tax entirely by dissolving itself as an insurance company and re-incorporating, with the same members, the same assets, the same liabilities, under some fanciful title as a benefit association.

Again, it is manifest that the requirement of equality is not satisfied by the provisions of the present law. Could there be any doubt on the subject that excise taxes of this character shall be in all respects uniform and impartial, that doubt, as

Mr. Justice Field stated, 157 U. S., 595, should be resolved in the interest of justice in favor of the taxpayer. It is respectfully submitted that the conclusions of the learned Justice apply with full force to the present law. Exemptions create inequalities; those not exempted bear an additional burden; a law containing arbitrary and capricious exemption is not uniform. Under the Constitution Congress has no power, at the expense of others owning property identical in character, to sustain private corporations such as building and loan associations, savings banks, and benefit societies, which advance no purpose or public interest and exist solely for the benefit of their own members. It has long been held that private enterprises cannot be aided under the pretence that it is legislative discretion to exempt them.

Loan Ass'n vs. Topeka, 20 Wall., 655;
Barbour vs. Louisville Bd. of Trade, 82 Ky., 645, 654-5;
Parkersburg vs. Brown, 106 U. S., 487.

Cooley on Taxation, page 215, observes:

> "It is difficult to conceive of a justifiable "exemption law which should select single in- "dividuals or corporations. or single articles "of property, and, taking them out of the class "to which they belong, make them the subject "of capricious legislative favor. Such favor- "itism could make no pretence to equality; it "would lack the semblance of legitimate tax "legislation."

None of the corporations exempted in the present Act can claim to be of a public or benevolent nature; under the law they differ in no essential

characteristic in their business from the corporations that are not exempted, while in fact, as the records of every court demonstrate, many building and loan associations and benefit orders find their reason for existence rather in the compensation to be paid to their officers than in the benefits to be paid to their members.

The discriminations of the law make for class legislation, yet it is the discrimination which makes this legislation possible. In one of the early cases this Court said, McCulloch vs. Maryland, 4 Wheat., 316, 435: "When they (the Congress) tax "chartered institutions of the States, they tax their "constituents; these taxes must be uniform."

Mr. Justice Field says, page 596: "Under * * * "constitutional legislation every citizen should "contribute his proportion, however small the sum, "* * * and it is no kindness to urge any * * * "to escape from their obligation. If he contributes "the smallest mite * * * he will have a greater "regard for the Government and more self-respect "for himself."

Accumulations in the corporations exempted have increased enormously since the Census of 1900. No recent statistics are available, but based upon that Census, it is conservatively estimated that the associations, societies and orders exempted under this Act will save not less than $3,000,000 a year by reason of such exemption.

The latest statistics of savings banks, covering the entire country, are those published in the Special Report from the Banks of the United States to the National Monetary Commission and presented to the Senate by Mr. Aldrich December 21, 1909, Senate Document No. 225.

This shows, Table No. 3, that the total resources of 642 mutual savings banks at the close of business April 28, 1909, were $3,394,926,000.

The same Report shows, Table No. 4, that on the same date 1,061 stock savings banks held aggregate resources of $677,784,099.

Both of these classes of banks make profits for their members. Why should one be taxed and the other exempted?

Yet the yearly saving to mutual savings banks alone by this exemption amounts to $1,200,000, while the yearly tax imposed by the Act upon the mutual life corporations is largely in excess of such amount.

Why should they be singled out for this favor of the Government can only be answered by the suggestion that, great as is the aggregate bulk of their property the individual interest of each member therein is comparatively small, making the number of members exceedingly large. Were such associations made subject to the tax the unpopularity of the tax and the Congress enacting the law would be so great as to call for the adverse action thereon by the constituents mentioned in the McCulloch case cited above. At the same time this statement of the facts of the exemption demonstrates beyond cavil that the Act in question infringes in every line the rule of uniformity required by the Constitution.

2. *The tax is unequal.*

Certainly no further proof can be needed to demonstrate that the corporation tax is not uniform. However, if it be urged the word "uniform" does not mean "equal," we find in the primary conception of the word "tax"

a requirement for equality. The powers of Congress are limited by the very nature of a free government, limitations respected indeed by all governments save absolute tyrannies, and the right of taxation is subject to these limitations. These are discussed in Cooley on Constitutional Limitations, and his conclusions, found at pages 598, 607, and 615, are briefly:

1. A tax must not be a confiscation of property.
2. Taxes must be both equal and uniform. As all are protected, so all should bear the burden in proportion to the interests secured.
3. Whatever the basis, taxes must be uniform.

And again in the same author's work on taxation, page 54, it is stated that approximate equality inheres in the very nature of the power to tax, whether or not declared in the written constitution. To the same effect when a judge of the Supreme Court of Michigan he stated in an opinion, *People* vs. *Salem*, 20 Mich. 452, at 473:

> "The tax must be laid according to some "rule of apportionment; not arbitrarily or by "caprice, but so that the burden may be made "to fall with something like impartiality upon "the persons or property upon which it justly "and equitably should rest * * * Equality "in the imposition of the burden is of the very "essence of the power itself, and though ab- "solute equality and absolute justice are never "attainable, the adoption of some rule tending "to that end is indispensable."

To the same effect is the decision in *Albany Bank vs. Maher*, 9 Fed., 884.

Congress has no powers save those expressly granted, and its every enactment must be just and impartial.

> Mugler vs. Kansas, 123 U. S., 623, 661;
> Coe vs. Errol, 116 U. S., 517, 524, 529.
> Soon Hing vs. Chowley, 113 U. S., 703, 709.

It may be contended that the discrimination of the present tax is only proper classification, but it is respectfully submitted that the authorities do not bear out this contention, because the decisions permitting reasonable classification stop short of arbitrary and capricious discrimination.

Connolly vs. *U. S. P. Co.*, 184 U. S., 540, at 560, citing and quoting

> G. S. & S. F. Co. vs. Ellis, 165 U. S., 150, 155-65.
> Cotting vs. K. C. S. Y. Co., 186 U. S., 79.

The line is well marked in

> *Am. S. R. Co.* vs. *Louisiana*, 178 U. S., 89,

where the Court said of a statute exempting sugar planters, refining their own sugar, from an excise tax:

> "The discrimination is obviously intended "as an encouragement to agriculture, and does "not deny to *persons* and *corporations* engaged

> "in a general refining business the equal pro-
> "tection of the laws."

If the Act of 1909 is intended to encourage thrift, why tax mutual life insurance companies?

Or, if Congress desired to tax occupations, why exempt persons and firms?

For the right of classification, where it exists, may not be exercised in a spirit of prejudice or favoritism.

Cook vs. *Marshall Co.*, 196 U. S., 274.

And again:

> "The power of classification is conceded,
> "but this will not uphold one that is purely
> "arbitrary. There must be some substantial
> "foundation and basis therefor."

S. A. L. vs. *Seegers*, 207 U. S., at 76.

And in this very connection it is important to note another discrimination against defendant and similar companies. The New York Life Insurance Company transacts business all over the civilized world, approximately one-fourth of its entire business being written outside of the United States; yet by the terms of the law it must pay a tax measured by the volume of its entire business, while foreign corporations, organized in other countries, are assessed for this tax upon the basis of the business done in the United States. This tax, therefore, is neither uniform nor equal in this particular.

No argument is needed to demonstrate that it is absolutely inequitable to levy upon a domestic corporation a heavier tax for business of the same character than upon a foreign corporation. Presumably defendant pays taxes in all foreign countries where it transacts business on the basis of the volume of such business; yet under the present law it will be required to pay a tax here upon the business upon which it has already paid a tax abroad, while the foreign corporations in the United States are exempted from this double taxation.

It has been held repeatedly that a State cannot tax property or business permanently beyond its borders by reason of the due process clause in the Constitution.

L., etc., Co. vs. Kentucky, 188 U. S., 385, 398.
U. T. Co. vs. Same, 199 U. S., 194, 209.
W. U. T. Co. vs. Kansas, 216 U. S., 38.
Pullman Co. vs. Same, 216 U. S., at 62.

And the same clause for the same reason renders invalid this attempt of Congress to tax the property and business of the defendant located beyond the United States.

3. *The tax takes property without due process of law.*

The action of Congress, then, in taxing the defendant while exempting other corporations of the same class, doing the same business, finds no warrant in the Constitution and is in express defiance not only of the uniformity clause, but also of the provisions of the Fifth Amendment, prescrib-

ing due process of law if private property be taken for public use. This Amendment, adopted in the fear that there might be abuse of the taxing power (*McCulloch* vs. *Maryland*, 4 Wheat., 433), provides that no person shall be deprived of property without due process of law.

In the *Sinking Fund Cases*, 99 U. S., 700, 718, this Court said:

> "The United States, * * * equally with the "States, are prohibited from depriving per- "sons or corporations of property without due "process of law."

And in a recent case this Court held, *Traction Co.* vs. *Mining Co.*, 196 U. S., 239, 251-2:

> "It is fundamental in American jurispru- "dence that private property cannot be taken "by the Government, *National* or State, ex- "cept for purposes which are of a public char- "acter, although such taking be accompanied "by compensation to the owner. That prin- "ciple grows out of the essential nature of all "free governments."

The reasoning upon which the rule so expressed finds its basis is strikingly illustrated by two cases decided in 1874, both of which have been frequently cited with approval and followed in this Court:

> Lowell vs. Boston, 111 Mass., 454.
> Loan Ass'n vs. Topeka, 20 Wall., 655.

In the former case it was said, page 461:

> "The principle of this distinction is funda- "mental. It underlies all government that is "based upon reason rather than upon force.

"* * * This power, when exercised in one "form, is taxation; in the other is designated "as the right of eminent domain. The two "are diverse in respect of the occasion and "mode of exercise, but identical in their "source, to wit: the necessities of organized "society; and in the end by which alone the "exercise of either can be justified, to wit: "some public service or use."

In the latter case this Court, speaking by Mr. Justice Miller, said, page 663:

"The power to tax is, therefore, the strong- "est, the most pervading of all the powers of "government, reaching directly or indirectly "to all classes of the people. * * * This power "can as readily be employed against one class "of individuals and in favor of another, so as "to ruin the one class and give unlimited "wealth and prosperity to the other, if there "is no implied limitation of the uses for which "the power may be exercised."

In *Hurtado* vs. *Cal.*, 110 U. S., 516, at 535, the Court said:

"But it is not to be supposed that these "legislative powers are absolute and despotic, "and that the amendment prescribing due pro- "cess of law is too vague and indefinite to "operate as a practical restraint. It is not "every act, legislative in form, that is law. "Law is something more than mere will ex- "erted as an act of power."

Therefore this Court has held again and again that process of law is only due when it operates on all alike, saying:

> "Due process of law * * * is secured by "laws operating on all alike, and not subject- "ing the individual to an arbitrary exercise "of the powers of government unrestrained "by the established principles of private rights "and distributive justice."
>
> Leeper vs. Texas, 139 U. S., 462, 468.
> Giozza vs. Tiernan, 149 U. S., 657, 662.
> Caldwell vs. Texas, 137 U. S., 692, 697.
> Bank vs. Okely, 4 Wheat., 235, 244.

Under these decisions it is apparent that an excise offends this provision of the Constitution when it taxes the defendant on one basis, foreign corporations doing the same business on an entirely different and more favorable basis, while it exempts entirely a large number of corporations doing exactly the same business, on the same lines, and governed by the same laws.

4. *The law creates a favored class.*

The corporations so exempted are clearly the object of undue favoritism. They are all private companies or associations in which the public as a whole has absolutely no concern. They are all composed of individuals united for a special business and they differ in no one particular from the defendant. They are all organized under State laws and deprive no power, privilege or franchise from the Federal Government.

The constituents of the corporation, the citizens

who compose it, are the real parties in interest, and on behalf of the citizens who compose the defendant it is respectfully urged that Congress has no right or power to discriminate between the defendant and the favored corporations so exempted. If classified it may be said that these are associations for the encouragement of thrift and providence. So is the defendant. Some of the exempted corporations have no stock. Neither has the defendant. If a company is to be favored because it is operated upon the mutual plan, why must the defendant pay a tax? Some of the corporations so exempted have stock of various kinds, differing in no respect whatever from an ordinary banking institution making large profits and distributing the same to their shareholders. Upon what Constitutional theory in regard for due process of law are such corporations exempted and the defendant taxed, when the defendant has no stock and, in the proper sense of the word, never makes a penny of profit? Indeed, if the method of computation was the same for insurance companies as for banks and industrial companies, no insurance company would be required to pay the tax, *because in every instance what the law in the case of the insurance company denominates "net income" is in reality only an over-payment upon the part of the policy holders, which is returned yearly to the policy holders, by the apportionment of surplus earnings, in cash or credit.*

Accordingly, we repeat, why must the defendant pay this tax and the favored corporations escape? The only logical reply would seem to be that Congress by some inscrutable process of Constitutional interpretation has been led to bestow a prefer-

ence on savings banks, building societies and fraternal orders over conservative insurance companies, no matter if the latter are mutual. The present tax is the first step and if it is sustained we may properly anticipate that it will be followed by others ultimately looking to the extinction of corporations like defendant, and the increase and enlargement of building societies and fraternal orders with fanciful names. That the Constitution of the United States permits such a course of stupendous folly is incredible.

In the *Pollock* case Mr. Justice Field said in discussing this limitation upon the taxing power:

> "This * * * forbids the imposition of "taxes which are unequal in their operation "upon similar kinds of property, and neces- "sarily strikes down the gross and arbitrary "distinctions in the income law as passed by "Congress. The law, as we have seen, dis- "tinguishes in the taxation between corpor- "ations by exempting the property of some "of them from taxation and levying the tax "on the property of others when the corpor- "ations do not materially differ from one "another in the character of their business "or in the protection required by the gov- "ernment. *Trifling differences in their "modes of business, but not in their results, "are made the ground and occasion of the "greatest possible differences in the amount "of taxes levied upon their income, showing "that the action of the legislative power upon "them has been arbitrary and capricious and "sometimes merely fanciful."*

IV.

If this is a tax on the right to exist of the corporation subjected thereto, it is not an excise tax within the meaning of Section 8, Article I, of the Constitution, and is therefore void.

There are three distinct positions which can be taken with reference to this law, either it is (1) an income tax, or (2) a tax upon a "calling or occupation"—"an excise" or (3) *a tax upon the form* in which the business is done—*a tax whose incidence is determined* not by what is manufactured, or sold, not by the business or occupation which is carried on, but *by the form of organization* for the carrying on of *any* kind of business.

The first and second positions are already found untenable, since as an income tax the law is clearly in violation of the principles established by the Pollock case, while as a tax upon business, the law with equal clearness violates every principle of excise taxation that such a tax must fall with substantial equality and uniformity upon all persons or corporations engaged in the business which is the object of the excise.

There remains then the far more subtle question of the validity of the law *as levying a tax upon the use of that certain form* in which countless different groups of individuals having organized, each to carry on its own particular business, while in every instance the business carried on by any particular group is totally exempt from taxation under this particular law unless carried on through the instrumentality of the particular form designated in this law.

No matter with what disguise or subtle phraseology the law is veiled, *its true interpretation*,—if we may paraphrase the words of Mr. Justice Moody,—*will be found in the determination of the end accomplished by the taxation and its actual and substantial purpose* and *effect*.

Behind the veil of "a special excise tax with respect to the carrying on or doing business" is revealed *a law which*, in its substance *purposes and effects to tax*, not some certain classes of business which may be carried on in any form, but *a certain particular form of carrying on any business—to tax*, in brief, *the use of the corporate form of organization*, no matter to what business or occupation that use is applied.

Thus revealed, it must be conceded that the law is at once novel, and revolutionary in its scope. No other law like it ever found its place upon the Federal statute book. Yet laws like this in "substantial purpose and effect"—but without disguise—are written in the statute books of every sovereign State of these United States.

Thus to the issue of the constitutionality of this law, the question at once becomes pertinent, *from what source did any group of individuals obtain the right to use this corporate form of organization over which this Federal law now seeks to assert the power of taxation?*

And the answer is—from the individual sovereign State.

The right to use this form—the right to exist,—or, as Mr. Justice Field put it, *"The right given by the State to two or more persons of being a corporation*, that is, of doing business in a corporate capacity and *not* the privilege of franchise which when incorporated, the company may exercise,"

(Home Ins. Co. vs. New York, 134 U. S. * *, 599), is granted by the sovereign power of the State by which the corporation is created and rests in the individuals who at any given time constitute the corporation.

This right to be a corporation is the right granted to the persons constituting the same to exercise certain of the rights and powers of natural persons. By the power of the State the individuals who organize a corporation are endowed with the ability to constitute an artificial person possessed of such powers of the natural person and of a prospective term of life as by the State prescribed.

The right of this artificial person to live and move and have a being is just as absolute under the power and protection of the State as is the right of the natural person so far as the lives of the two are in common.

Mr. Justice Field says further regarding this point:

> "The granting of such right or privilege rests "entirely in the discretion of the State, and, "of course, when granted, may be accompanied "with such conditions as its legislature may "judge most benefitting to its interests and "policy. *It may require as a condition of the "grant of the franchise, and also of its con-"tinued exercise,* that the corporation pay a "specific sum to the State each year or month, "or a specific portion of its gross receipts, or "of the profits of its business, or a sum to be "ascertained in any convenient mode which it "may prescribe. The validity of the tax can in "no way be dependent upon the mode which the "State may deem fit to adopt in fixing the

"amount for any year, which it will exact for "the franchise. No constitutional objection "lies in the way of a legislative body prescrib- "ing any mode of measurement to determine "the amount it will charge for the privilege it "bestows."

Have the States ever surrendered to the Nation their own prerogatives of creating this form of life, these bodies called corporations, of protecting the right to live of these corporations by them created, of securing from them in return for and as a condition of their continued existence a revenue in the form of a franchise tax?

Let us turn for a moment from the question of principle involved to the practical results.

In the State of New York, as shown by a recent message of the then Governor, now Mr. Justice Hughes, the revenue from the corporation franchise tax was over $9,000,000, nearly one-third of the entire amount collected by the State.

Already we find urged upon the Congress, the passage of a law for Federal incorporation. The desirability of such a law for certain corporations engaged in interstate commerce is not at issue.

But, if this law be valid, the possibilities resulting from its passage are as clear as the fate of state bank note circulation when the Federal Government determined upon the advisability of its elimination. There, in that instance, it was held that the State had expressly granted the right, but here in the absence of any such express grant by the States, can it be held that under the grant of power to levy excise, they surrendered to the Federal Government the power to destroy the existence, which they themselves in the exercise of

their prerogatives as independent sovereign States have created and fostered, and from which they derive so large a portion of the income needed for their own welfare?

In the words of Mr. Justice Brewer, at page 448, in the South Carolina case, cited infra:

> "The Constitution is a written instrument. As such its meaning does not alter. That which it meant when it was adopted it means now."

At the time of the adoption of the Constitution a franchise was defined as "a royal privilege, or a branch of the King's prerogative subsisting in the hands of a subject."

Cal. vs. Pac. R. R. Co., 127 U. S., 1.

This Court has defined a franchise as a "special privilege conferred by the Government, which does not belong to the citizens generally by common right."

Augusta Bk. vs. Earle, 13 Pet., 595.

In New York the definition has been stated as follows: "A franchise is a branch of the sovereign "power of the State subsisting in a person or a "corporation by a grant of the State.'

> R. H. R. R. Co. vs. N. Y. R. R. Co., 44 Hun, 206, at 212; affirmed and approved 110 N. Y., 128.

The distinction—so clearly indicated by Mr. Justice Field in the citation supra from the *Home*

Insurance case—and recognized likewise in Memphis R. R. Co. vs. Comm., 112 U. S., 619; Julian vs. C. T. Co., 193 U. S., 106; Vicksburg vs. Water Co., 202 U. S., at 464—between a franchise owned by a corporation, as for example a railroad or telegraph franchise, and *the franchise of existence* is vital to the determination of the issues here involved.

For here the Federal Government purposes, by this law, under the guise of an "excise," to tax this franchise of existence, granted to corporations by the several States; *seeks here to determine the amount* IT WILL CHARGE *for the privilege* IT DID NOT BESTOW.

Can any such construction of the word "excise" as used in Section 8 of Article I, be maintained?

In *Spreckles* vs. *McClain*, 192 U. S., 397, the definition of "excise" was before the Court and the Government there contended, page 405:

> "That the tax is *distinctly an excise* and in-
> "direct, and, so considered, it is uniform; that
> "it cannot be viewed as direct under the de-
> "cision of this Court or under any authorities,
> "judicial or economic, (a) *because* it does not
> "fall upon persons or property or incomes, ex-
> "cept in the most remote and indirect senses;
>
> "(b) because it falls upon a calling or occupa-
> "tion or the gains therefrom; (c) because it
> "really operates upon the operation of an in-
> "dustry, the exercise of a right, the use of prop-
> "erty, upon the business energies or activities;
> "(d) because the incidence of the tax can be,
> "and is, shifted and passed on, and, while im-
> "mediately paid for by the refiner, is ulti-
> "mately paid by the consumer."

The Government there relied on that meaning of the word "excise," which was most assuredly in the minds of the framers of the Constitution, who considered such an impost a duty upon use of property, upon consumption, a tax which, by non-user or refraining from consumption, the individual subject of the taxing power may avoid.

A comparison of Sec. 38 of the present law, Sec. 27 of the Act of 1898, and words of Mr. Justice Harlan in the *Spreckles* case, clearly reveals the distinction between the validity there, and the invalidity here.

Sec. 27 read:

> "That *every person, firm, corporation*, or "company *carrying on or doing the business of "refining petroleum or refining sugar*," etc.

Mr. Justice Harlan said of this at page 411:

> "The contention of the Government is that the tax is not a direct tax, but only an excise "imposed by Congress under the power to lay "and collect excise which shall be uniform "throughout the United States, Art. I, Sec. 8. "*Clearly the tax is* not imposed upon gross "annual receipts as property, but *only in re-"spect of carrying on or doing the business of "refining sugar.*"

Sec. 38 of the present Act reads:

> "That *every corporation* * * * shall be sub-"ject to pay annually a special excise tax *with "respect to the carrying on or doing business "by such corporation*" * * *.

This is not taxation of any business, *it is taxaction of the instrumentality through which the*

business is done, and *that instrumentality is the creation of the state in the exercise of its sovereignty*. There is nothing here which "can be and is, shifted and passed on." The corporation so taxed must submit to and pay the tax itself. It cannot add it to the price of the article manufactured or sold, for the firm or individual not subject to the tax would then undersell and the tax is not within any sound definition of an excise.

Though the form be ever so exact to the form of a valid "excise," it is the substance which the Court will look to, and the substance remains, not a tax upon any trade or calling, upon the use or consumption of any species of property, but an attempt upon the part of the Federal Government to "require as a condition * * * of its continued existence * * * that the corporation (*created by the State*) pay a specific sum" * * * *to the United States.*

For the Federal Government to levy a tax of this nature on the very right to exist of a corporation created by the State is to impair one of the sovereign prerogatives of the State, and this the Federal Government cannot do.

> Texas vs. White, 7 Wall, 700.
> Collector vs. Day, 11 Wall., 113, 127.
> Pollock vs. Trust Co., 157 U. S., 584.
> So. Car. vs. U. S., 199 U. S., 453.

In a case involving a somewhat similar question the Court said, West River Bridge Co. vs. Dix, 6 How., 507, 548, that a contract of incorporation *"may be taxed by the government under which it is held, though not by other governments so as to impair or obstruct it."*

This conclusion necessarily follows from the principle that the two governments, State and Federal, exist side by side and neither can interfere with the other.

> McCullough vs. Maryland, 4 Wheat., 316.
> California vs. Pac. Ry. Co., 127 U. S., 1.

The point was discussed in Ambrosini vs. U. S., 187 U. S., 1, holding the Federal war revenue stamp tax inapplicable to bonds required from liquor shops in Illinois. The Court said, page 8:

> "The question is whether the bonds were "taken in the excise of a function strictly be- "longing to the State and city in their ordi- "nary governmental capacity and we are of "the opinion that they were, and that they "were exempted as no more taxable than li- "censes."

Examining all the decisions cited we find the key-note to be this: Where a right granted by a State is in derogation of its sovereignty, Congress has the power to tax; where a right granted by a State is in exercise of its sovereignty, Congress has no power to tax. This contrast is clearly established by the *Ambrosini* and *Knowlton* vs. *Moore* cases. In the former the right discussed was in excise of sovereignty and not taxable; in the latter the right discussed was in derogation of sovereignty and taxable.

In *South Carolina* vs. *United States*, 199 U. S., 437, the Court held that State appointed liquor dealers must pay an excise tax on that occupation on the ground that if the State chose to engage in

such business, private in its nature and not a function of its sovereignty, it must do so on the same terms as any person and was subject to the taxing power of the Nation.

So if a State or City had been engaged in the business of refining sugar or petroleum, it would have been subject to the excise tax "in respect of carrying on or doing the business" of refining sugar or petroleum under Sec. 27 of the Act of 1898 in exactly the same manner as any person, or firm or corporation created by the State.

Thus the South Carolina case throws into clear relief the distinction between an excise, levied upon a business no matter by whom transacted, and this attempt to tax the privilege of existence, bestowed upon corporations by the State.

Can it ever be urged, that such a tax was within the contemplation of the men who drafted the Constitution or of the States which ratified its adoption?

Did the States, when they surrendered to the Federal Government the right to levy duties upon imports and excises upon trades or callings—taxes in other words upon use and consumption,—did they ever dream that this clause of their grant would some day be invoked as a basis for a tax upon the right of existence granted by themselves?

The old definition of an excise carries with it the suggestion of the greatest danger which exists in this law, the most potent argument against its validity.

An excise tax has always been a tax which could be avoided by non-user. *This so-called excise tax,* if it shall be sustained, *can be avoided in but one way, not by non-user but by non existence.*

The corporation cannot cease to use the privilege granted by the State save only as it ceases to exist.

The corporations are the creatures of the several States, to them they owe the very right to their existence, the right to be.

In the language of Mr. Justice Field, quoted in Plummer vs. Coler, 178 U. S., at page 129, "the power of the State over the corporate franchise *and the conditions upon which it shall be exercised* is * * * ample and plenary * * *."

The *State—the sovereignty which bestows such right of existence*—can alter, can prescribe the terms of the continued existence of its created subjects, can if it so wills, destroy such existence.

And these rights it exercises independent of the Federal Government.

The determination of the issue raised by the question whether the present tax is a valid excise on the right to exist of a corporation created by the State is far reaching and momentous in consequence. On this decision depends, in a most important degree, the separate and independent condition of the States, as established by the Constitution.

Mr. Justice Brewer at page 453, in the South Carolina case, quotes at length from the opinion of Mr. Chief Justice Chase in Texas vs. White, 7 Wall., 700:

> "Not only, therefore, can there be no loss of "separate and independent autonomy to the "States, through their union under the Con-"stitution, but *it may be not unreasonably said "that* the preservation of the States, and *the "maintenance of their governments*, are as "*much within the design and care of the Con-*

"*stitution as the preservation of the Union and*
"*the maintenance of the National Government.*
"The Constitution, in all its provisions, looks
"to an indestructible Union, composed of in-
"destructible States."

And again, from the opinion of Mr. Justice Nelson in The Collector vs. Day, 11 Wall., 113:

"It is admitted that there is *no express pro-*
"*vision in the Constitution that prohibits the*
"*General Government from taxing the means*
"*and instrumentalities of the States,* nor is
"there any prohibiting the States from taxing
"the means and instrumentalities of that Gov-
"ernment. *In both cases the exemption rests*
"*upon necessary implication, and is upheld by*
"*the great law of self-preservation;* as any gov-
"ernment, whose means employed in conduct-
"ing its operations, if subject to the control of
"another and distinct government, can exist
"only at the mercy of that government. *Of*
"*what avail are these means if another power*
"*may tax them at discretion?*"

Since there is no constitutional limit to the amount of an excise tax, it follows, if this tax be valid, the Federal Government in its discretion may tax State corporations out of existence and thus deny to the State the exercise of one of its most valued prerogatives—the right to create corporations.

It is submitted that under the Constitution and the many decisions of this Court interpreting the powers granted to the Federal Government, no such power as this was ever granted by the several States.

V.

The penalties prescribed by the Act are unconstitutional.

In the attempt to carry this unconstitutional tax into effect Congress has adopted an unconstitutional method. The administrative feature of the Act requires all corporations thereby taxed to produce and disclose their private books and papers at the request of the Federal authorities, with the view of subjecting them to the penalty imposed by the Act. That this provision offends the provisions of Articles IV and V of the Amendments to the Constitution is apparent on its face.

Boyd vs. *U. S.*, 116 U. S., 627, passim.

A similar provision of the tax law heretofore discussed by this Court on other features in *People* vs. *Reardon*, 204 U. S., 152, has recently been held by the New York Court of Appeals to be unconstitutional for this very reason, and the Court said (*People* vs. *Reardon*, 197 N. Y., 236-244):

> "This kind of an inquisition and the at-
> "tempt to secure from an individual evi-
> "dence which may be used to convict him
> "of a crime or to forfeit his property comes
> "well within the principles which have been
> "applied to the interpretation of the Constitu-
> "tion."

See also:

> Robson vs. Doyle, 191 Ill., 566;
> Emery's Case, 107 Mass., 172;

Counselman vs. Hitchcock, 142 U. S., 562;
People vs. Forbes, 143 N. Y., 219;
People vs. O'Brien, 176 N. Y., 253.

SUMMARY.

The argument that the law is unconstitutional may be summarized as follows:—

1. The tax imposed is an income tax pure and simple, for, although the name is changed, the Court will regard the substance rather than the name. The tax is therefore invalid under the decisions of the Court in the Pollock case.

2. Considered as an excise the tax is not uniform. It does not apply to all of a class alike, neither is it imposed on all of a class throughout the United States, differing in its application in New York and Massachusetts, as has been shown. It is therefore invalid.

3. The tax is not equal on all members of the classes it seeks to reach, exempting without basis some and taxing others. It is therefore invalid.

Loan Ass'n vs. *Topeka*, 20 Wall., 655.

4. In the same way the tax offends the due process clause of the Constitution. It in effect assesses certain corporations for the benefit of others which are exempted. It is therefore invalid.

Traction Co. vs. *Mining Co.*, 196 U. S., 239, at 251.